

**STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
45 Fremont Street, 24th Floor  
San Francisco, California 94105**

**NOTICE OF PROPOSED ACTION AND  
NOTICE OF PUBLIC HEARING**

**RH- 01013336  
December 30, 2004**

**SUBJECT OF HEARING:**

Notice is hereby given that a public hearing will be held regarding the adoption of three new articles in the California Code of Regulations:

- California Code of Regulations, Title 10, Chapter 5, Subchapter 3, Article 10.2, sections 2523.20 through 2523.25, entitled “Notices Regarding Sale or Liquidation of Assets and Standards for Medi-Cal Eligibility”
- California Code of Regulations, Title 10, Chapter 5, Subchapter 3, Article 10.3, sections 2523.30 through 2523.31, entitled “Applications for Individual Variable Annuity Contracts, Variable Life Insurance Contracts, and Modified Guaranteed Contracts” and
- California Code of Regulations, Title 10, Chapter 5, Subchapter 3, Article 10.4, sections 2523.40 through 2523.41, entitled “Seniors’ Insurance.”

The proposed regulations in Article 10.2 implement and make specific the provisions of California Insurance Code section 789.8. The proposed regulations contain definitions for “elder,” “elder’s agent,” “financial product,” and “Notice Regarding the Sale or Liquidation of Assets.” They establish a written form for the written advice required by Insurance Code section 789.8(b). The proposed regulations state when a life agent must provide an elder or elder’s agent with a copy of a Notice Regarding the Sale or Liquidation of Assets or a Notice Regarding Standards for Medi-Cal Eligibility. They set forth the procedures an agent must follow for securing a signature on each of the notice forms and for distributing originals and copies of the notice forms. The regulations prescribe record-keeping requirements for the forms and penalties for violations of the regulations.

The proposed regulations in Article 10.3 implement and make specific the provisions of California Insurance Code sections 790.03(a), 790.03(b), and 10127.10. The proposed regulations require that application forms for certain life insurance and annuity products contain language by which purchasers who are 60 years of age or older can choose to invest their premium money in one of four types of investments during the initial 30 days of the contract.

The proposed regulations in Article 10.4 implement and make specific the provisions of California Insurance Code sections 785 and 787. The proposed regulations provide that when an

advertisement for a seminar or similar event is directed towards persons age 65 or older and is paid for in whole or in part by an entity or person in the insurance industry, or an affiliate, the advertisement must disclose that the consumer's name may be made available to an insurance agent for the purpose of selling insurance.

**AUTHORITY AND REFERENCE:**

The Insurance Commissioner proposes the adoption of Title 10, Chapter 5, Subchapter 3, Article 10.2, sections 2523.20 through 2523.25, pursuant to the authority vested in him by sections 789.6(h), 12921(a), and 12926 of the California Insurance Code. The Commissioner's decision on the proposed regulations will implement, interpret, and make specific the provisions of Insurance Code sections 785, 789, 789.3, 789.8, 10508, and 10508.5.

The Insurance Commissioner proposes the adoption of Title 10, Chapter 5, Subchapter 3, Article 10.3, sections 2523.30 through 2523.31, entitled "Applications for Individual Variable Annuity Contracts, Variable Life Insurance Contracts, and Modified Guaranteed Contracts" pursuant to the authority vested in him by sections 790.10, 12921(a), and 12926 of the California Insurance Code. The Commissioner's decision on the proposed regulations will implement, interpret, and make specific the provisions of Insurance Code sections 790.03(a), 790.03(b), and 10127.10.

The Insurance Commissioner proposes the adoption of Title 10, Chapter 5, Subchapter 3, Article 10.4, sections 2523.40 through 2523.41, entitled "Seniors' Insurance" pursuant to the authority vested in him by sections 789.6(h), 12921(a), and 12926 of the California Insurance Code. The Commissioner's decision on the proposed regulations will implement, interpret, and make specific the provisions of Insurance Code sections 785 and 787.

**HEARING DATE AND LOCATION:**

Notice is hereby given that a public hearing will be held to permit all interested persons the opportunity to present statements or arguments, orally or in writing, with respect to the proposed regulations as follows:

<b>Date and time:</b>	<b>March 10, 2005</b> <b>10:00 am*</b>
<b>Location:</b>	<b>Department of Insurance Hearing Room</b> <b>45 Fremont Street, 22<sup>nd</sup> Floor</b> <b>San Francisco, CA 94105</b>

\*The hearing will continue on the date noted until all testimony has been completed or 5:00 p.m., whichever is earlier.

**PRESENTATION OF WRITTEN AND/OR ORAL COMMENTS; CONTACT PERSONS:**

All persons are invited to present oral and/or written comments at the scheduled public hearing. Written comments should be addressed to the contact person:

Nancy Hom, Staff Counsel III  
California Department of Insurance  
45 Fremont Street, 24th Floor  
San Francisco, CA 94105  
Telephone: (415) 538-4144

Questions regarding the hearing, comments, or the substance of the proposed action should be addressed to the contact person listed above. If she is unavailable, inquiries may be addressed to the backup contact person:

Patricia Staggs, Assistant Chief Counsel  
California Department of Insurance  
45 Fremont Street, 21st Floor  
San Francisco, CA 94105  
Telephone: (415) 538-4123

#### DEADLINE FOR WRITTEN COMMENTS:

All written comments, whether submitted at the hearing, or by U.S. mail, or by e-mail or facsimile, must be received by the Insurance Commissioner, c/o the contact person at the address listed above, no later than **5:00 p.m. on March 10, 2005**. Any written materials received after that time will not be considered.

#### COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE:

The Commissioner will accept written comments transmitted by e-mail provided they are sent to the following e-mail address: [homn@insurance.ca.gov](mailto:homn@insurance.ca.gov). The Commissioner will also accept written comments transmitted by facsimile provided they are sent to the attention of the contact person at the following facsimile number: (415) 904-5729. **Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the March 10, 2005 deadline for written comments set forth above.**

#### ACCESS TO HEARING ROOMS:

The facilities to be used for the public hearing are accessible to persons with mobility impairments. Persons with sight or hearing impairments are requested to notify the contact person(s) for the hearing in order to make special arrangements, if necessary.

#### ADVOCACY OR WITNESS FEES:

Persons or groups representing the interests of consumers may be entitled to reasonable advocacy fees, witness fees, and other reasonable expenses, in accordance with the provisions of Title 10 of the California Code of Regulations, in connection with their participation in this matter. Interested persons

should contact the Office of the Public Advisor at the following address to inquire about the appropriate procedures:

California Department of Insurance  
Office of the Public Advisor  
300 Capitol Mall, 17<sup>th</sup> Floor  
Sacramento, CA 95814  
(916) 492-3559

A copy of any written materials submitted to the Public Advisor regarding this rulemaking must also be submitted to the contact person for this hearing. Please contact the Office of the Public Advisor for further information.

## **INFORMATIVE DIGEST:**

### **POLICY STATEMENT OVERVIEW**

#### **Article 10.2** Notices Regarding Sale or Liquidation of Assets and Standards for Medi-Cal Eligibility.

Insurance Code section 789.8 was enacted to prevent misleading sales pitches and misrepresentations directed against elderly people. The statute requires life agents selling life insurance and annuity products to elderly people to provide specified information to elders or their representatives concerning the sale of assets and Medi-Cal. The Department's objective in promulgating the proposed regulations in Article 10.2 is to implement, interpret, and make specific the provisions of Insurance Code section 789.8 by defining terms and phrases, requiring a standardized notice to meet certain statutory "written advice" requirements, by stating when statutorily required information must be provided to elderly consumers, by confirming that records must be kept, and by specifying applicable penalties. The overall objective is to facilitate enforcement of the consumer protection provisions of Insurance Code section 789.8 and to implement the statute's protections for elderly individuals.

#### **Article 10.3** Applications for Individual Variable Annuity Contracts, Variable Life Insurance Contracts, and Modified Guaranteed Contracts.

Insurance Code section 10127.10 provides in part that individuals 60 years of age or older may return certain variable insurance products within 30 days of purchasing them and receive a refund of their premium money or account balances. Section 10127.10 allows purchasers to invest their initial premium payment in any of four types of investments for the initial 30-day period if the consumer so chooses. The objective of the proposed regulation is to present the consumer with the statutory investment choices before the 30-day period begins rather than after it has started, because that is the simplest, most effective and most inexpensive way to effectuate the investment choice provisions of section 10127.10. This also reduces the chance that the consumer will have misunderstandings about the 30-day free look period or their investment choices at the time they enter into the transaction.

#### **Article 10.4** Seniors' Insurance.

Insurance Code sections 785 and 787 require insurance agents and others to act in good faith and to make certain disclosures in advertisements aimed at consumers who are age 65 or older. Many seniors are

unaware that when they provide their names at seminars or events connected with persons in the insurance industry that they may be targeted later by insurance agents who want to sell them annuities. The objective of the proposed regulations is to inform elderly consumers that if they provide their names at such seminars or events that their names may be made available to insurance agents for the purpose of selling insurance.

## SUMMARY OF EXISTING LAW; EFFECT OF PROPOSED ACTION.

### Article 10.2

#### Proposed section 2523.20. Authority and Purpose.

Existing law does not state the authority and reference for the proposed regulations in Article 10.2. Proposed section 2523.20 states the authority and reference for the regulations.

#### Proposed section 2523.21. Definitions.

Existing law (Insurance Code section 789.8) uses terms and phrases that are not defined. Section 2523.21 of the proposed regulations defines terms used in section 789.8 and in the proposed regulations themselves. Proposed section 2523.21(a) defines the term “elder” as it is defined in the statute and used in the proposed regulations. Proposed section 2523.21(b) defines “elder’s agent” as used in the statute and the regulations. Proposed section 2523.21(c) defines “financial product,” a term used in section 789.8 but never defined. Proposed section 2523.21(d) defines “Notice Regarding the Sale or Liquidation of Assets” as the written advice required by Insurance Code section 789.8(b). The definitions in the proposed regulations reduce confusion and ambiguity, clarify agents’ legal obligations, and assist the Department in identifying unlawful conduct for purposes of enforcement action.

#### Proposed section 2523.22. Notice Regarding the Sale or Liquidation of Assets.

If a life insurance agent offers to sell a life insurance or annuity product to an individual age 65 or older, existing law requires the agent to advise the elder or the elder’s agent in writing of specific financial consequences that may occur if the elder sells assets to purchase the insurance product. Existing law also requires the life agent to advise the elder in writing that they may want to “consult independent legal or financial advice” (sic) before selling an asset to fund the purchase of a life insurance or annuity product. However, existing law does not provide the wording of the written advice and does not state a particular format for it. To clearly identify what the statute requires and to prevent some life agents from implementing section 789.8(b) in such a way as to make it ineffective, such as printing the advice in very small type or phrasing the advice in a misleading way, proposed regulation section 2523.22 sets forth the required “written advice” in a standardized form and format. This will facilitate both compliance with and enforcement of the statute.

#### Proposed section 2523.23. Notice Regarding Standards for Medi-Cal Eligibility.

Existing law requires life agents to provide elders or elders’ agents with a “Notice Regarding Standards for Medi-Cal Eligibility” when they sell or offer to sell any financial product based on the product’s treatment under the Medi-Cal program. Existing law does not explain what is meant by selling or

offering to sell a financial product based on the product's treatment under the Medi-Cal program. Proposed regulation section 2523.23 defines when a financial product "shall be deemed to have been sold or offered for sale on the basis of the product's treatment under the Medi-Cal program." This should facilitate both compliance with and enforcement of the statute.

Proposed section 2523.24. Notice and Record-Keeping Requirements.

Existing law does not require the elder or the elder's agent to date and sign the "written advice" required by Insurance Code section 789.8(b), and section 789.8(b) contains no statement that the advice must be given to the elder or elder's agent *before* they purchase a life insurance or annuity product rather than afterwards. Similarly, Insurance Code section 789.8(d) does not state that the Notice Regarding Standards for Medi-Cal Eligibility" must be given to the elder or elder's agent *before* they enter into a transaction rather than afterwards. Existing law sets forth record-keeping requirements for insurers and insurance agents and brokers, but does not expressly state that the notices provided pursuant to Insurance Code section 789.8 are subject to existing record-keeping requirements. To ensure that the statutorily-required notices are provided before the sale of a financial product rather than afterwards, and that agents and insurers keep adequate records of the notices to document their compliance (or non-compliance) with the statute, section 2523.24 of the proposed regulations requires the section 789.8(b) notice to be dated and signed and requires copies of each notice to be provided to the elder or elder's agent. Proposed section 2523.24 states when notices must be presented and signed, and it specifies applicable record-keeping requirements. Proposed section 2523.24 requires insurers and life insurance agents to maintain originals and copies of the notices for at least five (5) years, as required by Insurance Code section 10508 and 10508.5.

Proposed section 2523.25. Penalties.

Existing law (Insurance Code sections 789 and 789.3) sets forth penalties for violations of section 789.8, Article 6.3, Chapter 1, Part 2, Division 1 of the Insurance Code. Proposed section 2523.25 clarifies that these penalty provisions also apply to violations of the proposed regulations, and that other penalty provisions may apply as well.

Article 10.3

Proposed section 2523.30. Authority and Purpose.

Existing law does not state the authority and reference for the proposed regulations in Article 10.3. Proposed section 2523.20 states the authority and reference for the regulations.

Proposed section 2523.31. Applications for Individual Variable Annuity Contracts, Variable Life Insurance Contracts, and Modified Guaranteed Contracts that are Required to Set Forth Investment Choices.

Existing law (Insurance Code section 10127.10) provides in part that individuals 60 years of age or older may return certain variable insurance products within 30 days of purchasing them and receive a refund of their premium money or account balances. Section 10127.10 allows purchasers to invest their initial premium payment in any of four types of investments for the initial 30-day period if the consumer so chooses. However, under existing law consumers are told of the 30-day free look period and the investment choices in the product they have already purchased rather than in the application form before

they decide to purchase the product. Proposed section 2523.31 requires that the consumer be informed of the 30-day free look and the investment options in the application form for products offering these investment choices.

#### Article 10.4

##### Proposed section 2523.40. Authority and Purpose.

Existing law does not state the authority and reference for the proposed regulations in Article 10.4.

Proposed section 2523.40 states the authority and reference for the regulations.

##### Proposed section 2523.41. Advertising Seminars or Events Directed towards Persons Age 65 or Older.

Existing law (California Insurance Code section 785(a)) provides that all insurers, brokers, agents, and others engaged in the transaction of insurance owe a prospective insured who is 65 years of age or older a duty of honesty, good faith, and fair dealing. Existing law (California Insurance Code section 787) also provides in part, "Any advertisement or other device designed to produce leads based on a response from a potential insured which is directed towards persons age 65 or older shall prominently disclose that an agent may contact the applicant if that is the fact. In addition, an agent who makes contact with a person as a result of acquiring that person's name from a lead generating device shall disclose that fact in the initial contact with the person." Despite existing law, California seniors are being repeatedly misled into providing their names at seminars or other events without knowing that their names are being obtained so that insurance agents can contact them later to sell them annuities. Proposed section 2523.41 requires advertisements for such seminars or events to carry a prominent disclosure which tells seniors that when they attend the seminar, their names may be made available to insurance agents for the purpose of selling insurance.

#### MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The proposed regulations do not impose any mandate on local agencies or school districts.

#### COST OR SAVINGS TO ANY STATE OR LOCAL AGENCY OR SCHOOL DISTRICT; COST OR SAVINGS IN FEDERAL FUNDING:

The Commissioner has determined that the proposed regulations will result in no cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, no other nondiscretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State.

#### ECONOMIC IMPACT ON BUSINESSES AND THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE:

The Commissioner has made an initial determination that the proposed regulations may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The types of businesses that may be affected are insurance agents and insurance companies. The Commissioner has considered performance standards, but the Commissioner has identified no performance standards that would be as effective as the

proposed regulations in enforcing the statutes that form the basis for the proposed regulations. The Commissioner has not considered other proposed alternatives that would lessen any adverse economic impact on

business and invites interested parties to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance or reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards,
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

#### POTENTIAL COST IMPACT ON PRIVATE PERSONS OR ENTITIES/BUSINESSES:

The Commissioner must determine the potential cost impact of the proposed regulations on private persons or businesses directly affected by the proposed regulations. The proposed regulations are designed to prevent senior citizens from entering into unsuitable insurance transactions which cause seniors to lose millions of dollars. The regulations are expected to cause agents and insurers who induce seniors to enter into unsuitable or financially detrimental transactions to lose business because they will be completing fewer unsuitable or financially detrimental transactions. The Commissioner expects that the cost impact of the proposed regulations on life insurance agents and insurance companies generally would be the minimal cost of re-typing already-existing written notices and application forms so that they comply with the requirements of the regulations. The cost of printing the notices and application forms would remain the same. Insurers may have to re-file some product application forms with the Department of Insurance for approval if they choose to offer products containing stock or bond fund investment options during the 30-day free look period of Insurance Code section 10127.10, but they may avoid this obligation by offering products without these investment choices. The filing expense is a routine expense incurred by insurers doing business in California.

#### FINDING OF NECESSITY:

The Commissioner finds that it is necessary for the welfare of the people of the State that the regulations apply to businesses.

#### EFFECT ON JOBS AND BUSINESSES IN CALIFORNIA:

The Commissioner is required to assess any impact the regulations may have on the creation or elimination of jobs within the State of California as well as the creation of new businesses, the elimination of new businesses, and the expansion of businesses currently operating in the State. The Commissioner does not foresee that the proposed regulations will have an impact on any of the above but invites interested parties to comment on this issue.

#### IMPACT ON HOUSING COSTS:

The matters proposed herein will have no significant effect on housing costs.



### ALTERNATIVES:

The Commissioner must determine that no reasonable alternative considered by the Commissioner or that has otherwise been identified and brought to the attention of the Commissioner would be more effective in carrying out the purposes for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations. The Commissioner invites public comment on alternatives to the regulations.

### IMPACT ON SMALL BUSINESS:

The Commissioner has initially determined that the proposed regulations may have a significant negative effect on some small businesses because the proposed regulations are designed to curtail the ability of life insurance agents to sell life insurance and annuity products based on incomplete, misleading, or false information. These agents may sell fewer life insurance and annuity products as a result of the proposed regulations. The proposed regulations may have a positive impact on small businesses to the extent the proposed regulations curtail the activities of agents who mislead consumers or otherwise violate the law, and law-abiding agents gain business as a result. To the extent independent insurance agents (as opposed to insurance company employees) are impacted by the proposed regulations, the Commissioner has identified no reasonable alternatives to the proposed regulations that would lessen any adverse impact on small business while still enforcing compliance with existing law. The proposed regulations do not impact “small business” to the extent they impact insurers because insurers are not “small businesses” under Government Code §11342.610. The Commissioner invites public comment on alternatives to the regulations.

### COMPARABLE FEDERAL LAW:

There are no existing federal regulations or statutes comparable to the proposed regulations.

### TEXT OF REGULATIONS AND INITIAL STATEMENT OF REASONS:

The Department has prepared an Initial Statement of Reasons that sets forth the reasons for the proposed regulations. Upon request, the Initial Statement of Reasons will be made available for inspection and copying. Requests for the Initial Statement of Reasons or questions regarding this proceeding should be directed to the contact person listed above. Upon request, the Final Statement of Reasons will be made available for inspection and copying once it has been prepared. Requests for the Final Statement of Reasons should be directed to the contact person listed above.

The file for this proceeding, which includes a copy of the proposed regulations, the Initial Statement of Reasons, the information upon which the proposed action is based, and any supplemental information, including any reports, documentation and other materials related to the proposed action that is contained in the rulemaking file, is available for inspection and copying by prior appointment at 45 Fremont Street, 24th Floor, San Francisco, California 94105, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

### AUTOMATIC MAILING:

A copy of the proposed regulations and this Notice (including the Informative Digest, which contains the general substance of the proposed regulations) will automatically be sent to all persons on the Insurance Commissioner's mailing list.

WEBSITE POSTINGS:

Documents concerning this proceeding will be available on the Department's website. The documents shall include the proposed regulations, the Notice of Hearing and Informative Digest, the Initial Statement of Reasons, and, when has been prepared, the Final Statement of Reasons. To access documents concerning this proceeding, go to <http://www.insurance.ca.gov>. Find the heading "QUICK LINKS" in blue in the middle of the screen. Click on the subheading "Legal Information" under the "QUICK LINKS" heading, then click on the heading "Proposed Regulations." When the search field appears, enter 'RH01013336' (the Department's regulation file number for these regulations).

MODIFIED LANGUAGE:

If the regulations adopted by the Department differ but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Interested persons should request a copy of these regulations prior to adoption from the contact person listed above.

Dated: December 30, 2004

JOHN GARAMENDI  
Insurance Commissioner

By: \_\_\_\_\_  
Patricia Staggs  
Assistant Chief Counsel